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No.

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In the Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,
vs.
ROADWAY EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Does a State deprive a permanent, non-probationary employee of her "freedom of contract" without due process and deny her the equal protection of the laws when its appellate courts hold—contrary to the intent of the parties as determined by a jury—that she cannot make or enforce a contract of assured employment terminable only for good cause?

2. Whether the Court should hold—and, if necessary, overrule the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)—that a State shall not abridge the fundamental right of citizens of the United States, guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1870, "to make and enforce contracts" of employment?

PARTIES BELOW

The parties below were petitioner Helen West, appellant in the Supreme Court of Ohio, and respondents Roadway Express, Inc., Otto E. Liipfert, and William F. Spitznagel, appellees in the Supreme Court of Ohio. Roadway Express, Inc. was a party to the contract portion of petitioner's appeal, and Roadway Express, Inc., Otto E. Liipfert, and William F. Spitznagel were parties to the tort aspect of petitioner's appeal.

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No.

In the Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner Helen West respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on September 15, 1982.

OPINION BELOW

No opinion was rendered by the Supreme Court of Ohio. The opinion of the Ohio Ninth District Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on September 15, 1982, dismissing, *sua sponte*, petitioner's appeal for the reason that no substantial constitutional question existed therein. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitution of the United States, Amendment Fourteen

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

Civil Rights Act of 1866 (Approved April 9, 1866)
14 Stat. 27

THIRTY-NINTH CONGRESS. Sess. I.

CHAP. XXXI.—*An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding In-

dians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

• • • • •

Civil Rights Act of 1870 (Approved May 31, 1870)
16 Stat. 140

FORTY-FIRST CONGRESS. Sess. II.

CHAP. CXIV.—*An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.*

• • • • •

SEC. 16. *And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind,

and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. * * *

* * * * *

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

* * * * *

STATEMENT OF THE CASE

Petitioner Helen West was discharged on June 24, 1976 by the respondent Roadway Express, Inc. ("Roadway") after more than 20 years of employment at Roadway's Akron, Ohio corporate headquarters as a personal secretary (Staff Assistant—Operations and Sales) to Roadway's executive vice president of field operations. Roadway is a trucking company engaged in interstate commerce. Mrs. West was born in Akron, Ohio and was 47 years old when she was discharged.

Petitioner brought suit in the Summit County, Ohio Common Pleas Court against Roadway for wrongful discharge. Because of Roadway's pension plan, protected under the Employee Retirement Income Security Act of 1974 (ERISA),[1] Roadway's stock bonus plan payable in Roadway stock at retirement age 65, and other incentive plans and benefit programs for Roadway's permanent, non-probationary, nonunion salaried employees, Mrs. West claimed she had a property interest in her employment.

1. 29 U.S.C. §§ 1001, *et seq.*

She alleged that her dismissal was both a breach of an implied contract of assured employment until retirement age 65 and, because her dismissal was motivated by her rejection of a sexual proposition by her superior, a tort. The tort aspects of her action were dismissed by the trial court on motions to dismiss and for summary judgment, and the case was tried to a jury as an action for breach of an employment contract. After defining both an express and an implied contract, the court instructed the jury to find from the evidence: (1) whether Roadway had impliedly promised petitioner that she would not be discharged except for cause after successfully completing a probationary period; (2) if she had been so promised, whether Roadway had just cause for terminating her; and (3), if not, the amount of damages. The jury returned a verdict for Mrs. West in the amount of $287,000.00.

Roadway appealed to the Ohio Ninth District Court of Appeals. Petitioner cross-appealed from the trial judge's dismissal of her tort claims. The Court of Appeals held that "[t]he established law of Ohio is that in the absence of an employment contract for a fixed and definite period, an employee may be terminated at the will of the employer for such cause as the employer believes valid." (App. A7). The court concluded "that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway." (App. A11). The Court, in explaining its decision, said: "As we have previously stated . . . plaintiff had neither an express nor an implied contract of employment." (App. A25). Roadway's motion for summary judgment [later corrected to directed verdict] should have been granted, it being entitled to judgment as a matter of law." (App. A12). The Court of Appeals sustained the trial court's dismissal of petitioner's tort

claims. The judgment for petitioner was reversed and final judgment entered for Roadway.

The Court of Appeals did not find that the jury's verdict was against the manifest weight of the evidence. That its decision was not based upon any factual dispute is supported by the court's statement that the trial judge erred in not granting summary judgment. The Court of Appeals, accepting all of petitioner's contentions as true, held that a promise of permanent employment terminable at retirement age 65 was too indefinite to be an enforceable promise, creating no contract obligation. Because there was no employment contract, the court found, there was no need for a retrial on the issue of whether Roadway had breached its promise of permanent employment terminable only for cause. According to the Court of Appeals, there should not have been a trial at all.

Until the decision of the Ninth District Court of Appeals, there was no constitutional deprivation on petitioner's contract claim. The trial judge had properly recognized that petitioner's employment was a contract, and had submitted the issue of its terms and duration to the jury. Petitioner's first opportunity, therefore, to object to a constitutional deprivation was in her appeal to the Ohio Supreme Court.

In her Memorandum in Support of Claimed Jurisdiction filed with the Ohio Supreme Court, petitioner assigned as error that the Court of Appeals had deprived her of her right to contract employment and of her "liberty and property . . . contrary to . . . the Constitution of Ohio and . . . the Fourteenth Amendment of the Constitution of the United States." (App. A39). Petitioner also urged that "The contract aspects of the Court of Appeals' decision affects every management level employee in Ohio who is not

high enough in the corporate hierarchy to command a written contract of employment and not low enough to belong to a labor union. . . ."

The Ohio Supreme Court dismissed her appeal on constitutional grounds and overruled her motion to certify the record.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH SUBSTANTIVE DUE PROCESS DECISIONS OF THIS COURT AND HAS NO FAIR OR SUBSTANTIAL BASIS UNDER OHIO LAW.

The right of an employee to contract for the sale of his labor, *the right to work*, is a fundamental and vital right incorporating the rights to individual liberty and to acquire property. "[L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). As Justice Pitney observed in *Coppage v. Kansas*, 236 U.S. 1, 14 (1915):

> Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

Employment in a free society is of necessity based on contract, express or implied. The Court has held that "[t]he right to hold specific private employment . . . [is] 'liberty' and 'property' . . ." *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Freedom of contract, therefore, is a substantive due process right, rather than simply a privilege grounded on state law.

A state may act "through its judicial, as well as through its legislative, executive, or administrative, branch of government." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). Furthermore, "judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

The decision below had no fair or substantial basis under Ohio law and was an arbitrary and capricious exercise of power. *See, Muhlker v. New York and Harlem Railroad Company*, 197 U.S. 544 (1905); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930). Ohio is one of the states—or was until this decision—taking the view that the court "should examine all of the circumstances in the employment relationship to determine what the parties intended on the question of duration of work". Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351, n.110 (1974). In *Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976), relied on by the Court of Appeals in our case, the Ohio Supreme Court, quoting *Bascom v. Shillito*, 37 Ohio St. 431 (1882), with approval, commented, 45 Ohio St. 2d 252: "'. . . [t]he issue presented [the duration of the employment] was purely one of fact . . . for the jury . . .'". No Ohio case has previously held that an employment promise for an indefinite term is not a contract. No Ohio case

has held that the intent of the parties is not to be considered in determining the duration or other terms of the contract. The decision of the Ninth District Court of Appeals has no basis whatsoever under Ohio law.

Assuming, *arguendo*, that a promise of employment until mandatory retirement age 65 is for an indefinite duration, the issue is whether Ohio, without depriving an employee of a Fourteenth Amendment right to contract employment, may hold that such a promise is unenforceable as a contract. If this is the "established law" of Ohio, then an employee who desires employment in Ohio must insist, to have a valid employment contract, that his employer guarantee or assure him employment for a specific number of years, months, days, etc. before he may enforce his employment agreement. But no employer, unless the employee has a remarkable talent or unique skill, will ever promise employment for a specific duration. See Blades, *Employment at Will vs. Economic Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). "[I]ndividual employees are simply not in a position to exact such contracts [promises for a definite duration] from their employers." Blades, *id.*, 1411. In the absence of a union, the employment contract is a contract of adhesion. To allow Ohio's holding to stand is to effectively deprive all nonunion employees in Ohio, and elsewhere, of the opportunity to enter into and enforce an employment contract for future services.

Assuming again that a promise of employment until mandatory retirement age 65 is indefinite, there is no reason why such a contract should not be enforceable. Other contracts which are indefinite in some respects, such as requirements contracts, are enforceable. If the intention of the parties can be determined from the surrounding circumstances, or from company practices and

policies,[2] then the contract should be enforced. If the employer has in fact promised the employee that she will not be discharged without just cause, the employer's promise should be enforced. As stated by Justice Stewart in *Perry v. Sindermann*, 408 U.S. 593, 602 (1972): "[T]here may be an unwritten 'common law' . . . that certain employees shall have the equivalent of tenure."

II. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION INVOLVING THE EQUAL PROTECTION OF THE LAWS AND THE FUNDAMENTAL RIGHT, PRIVILEGE AND IMMUNITY TO CONTRACT EMPLOYMENT WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

A. By Creating a Class of Employees Who Are Denied the Right to Contract Employment, Ohio Has Denied Those Employees the Equal Protection of the Laws.

Under the National Labor Relations Act, as amended by the Taft-Hartley Act,[3] petitioner as a staff assistant to the executive vice president of field operations and therefore privy to confidential information at the highest corporate level could not receive the benefits of representation by a labor organization. The Court has held that

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2. The reputed author of the "terminable-at-will" doctrine noted in the treatise giving birth to the rule:

"But in order to show what the real understanding and intention of the parties was, all the facts and circumstances surrounding the parties and the transaction, may be shown, as that the plaintiff was, to the knowledge of the defendant, seeking a *permanent* situation, and any facts or circumstances that tend to establish the *mutual* understanding of the parties. . . ." WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, § 134, 272, n.5 (1877).

3. 29 U.S.C. §§ 152(3), 152(11), 164(a).

the Taft-Hartley amendment denies supervisory employees the benefit of union representation. *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974); *cf., N.L.R.B. v. Hendricks County Rural Electric Membership Corporation*, 474 U.S. 170 (1981).

The Court of Appeals held that petitioner had no employment contract, despite the jury's finding that petitioner had been promised permanent employment terminable only for cause. Had her employment been the subject of a collective-bargaining agreement for a specific duration, the Ohio Court of Appeals, following its rationale, would have held that she was a contract employee. Had she been a high corporate official, she could have demanded a contract for a specific duration. There is no rational reason why a middle-level management employee should be denied the opportunity to contract future employment, while a union member or high corporate officer is not denied the opportunity to contract future employment. Ohio has created a new classification of employees, i.e., "non-contract" employees, thus denying some employees the same rights to enter into employment contracts as is granted to other employees. This holding denied to petitioner her Fourteenth Amendment right to the equal protection of the laws.

B. The Right to Make and Enforce a Contract of Employment Is a Fundamental Right, Privilege or Immunity of a Citizen of the United States, Guaranteed by the Fourteenth Amendment and the Laws Enacted by Congress Pursuant Thereto.

Following the Civil War, one of the first acts of the newly elected 39th Congress was to enact an amendment to the Freedmen's Bureau Bill, followed by the Civil

Rights Act of 1866 (14 Stat. 27). These two bills sought to enforce the natural rights, privileges and immunities of the American people directly through the federal government. Section 1 of the Civil Rights Act and Section 7 of the Freedmen's Bureau Bill had identical lists of the civil rights to be guaranteed by the national government:

1. The right to make and enforce contracts;
2. The right to buy, sell and own real and personal property;
3. The right to sue, be parties and give evidence;
4. The right to full and equal benefits of all laws and proceedings for the security of persons and property.

As stated by Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1326 (1952): "Neither bill was designed exclusively for the benefit of Negroes." The Freedmen's bill was intended to protect the rights of "refugees and freed men in all parts of the United States", while the Civil Rights Act covered the civil rights of all "citizens, of every race and color . . . in every State and Territory in the United States . . .". Both state action and state inaction fell within the ambit of these bills. The right to "make and enforce contracts" and "to sue" were declared by Congress to be civil rights to be enjoyed by all American citizens in every State and Territory of the United States. The Fourteenth Amendment was adopted to remove any doubt about the validity of the Civil Rights Act of 1866.[4] After the ratification of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1870 (16 Stat. 140), which reenacted the Civil Rights Act of 1866.

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4. *Adamson v. California*, 332 U.S. 46, 107-108 (1947). (Black, J., dissenting).

Our purpose in citing these statutes is to articulate what we believe to be some of the fundamental rights, privileges and immunities of all Americans. *E.g., Ex parte Virginia,* 100 U.S. 339 (1879); *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *United States v. Price,* 383 U.S. 787, 800-807 (1966); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422-437 (1968); *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972). Obviously, the right to make and enforce contracts, particularly contracts of employment, was one of several basic civil rights which Congress intended to protect from the deprivations of the states. Although it has been held that the civil rights acts were intended to prevent racial discrimination, *e.g., McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 285-296 (1976), the Civil Rights Acts of 1866 and 1870 were enacted to secure the fundamental civil rights of all inhabitants of the United States regardless of race.

The right to make and enforce an employment contract is one of the most basic of all human rights. Work is essential to life itself. If a worker may not accept a promise of future employment and enforce his employer's promise in court, then we are no longer a nation of free people. *Hodges v. United States,* 203 U.S. 1 (1906), *overruled, Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873). We believe that the right to make and enforce an employment contract was intended by Congress, in enacting the Civil Rights Acts pursuant to Section 5 of the Fourteenth Amendment, to be one of the rights, privileges and immunities which a State, through either its legislative, executive, administrative, or judicial branch, may not abridge. When a State's judiciary categorizes as a non-contract what has historically and universally been recognized to be a contract, then the State has abridged

the right to "make and enforce" a contract. If the Ohio Supreme Court will not protect petitioner's rights as an Ohioan, then this Court should protect her rights as an American.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated September 15, 1982)

No. 82-910

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

HELEN WEST,
Appellant,
vs.
ROADWAY EXPRESS, INC., *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated September 15, 1982)

No. 82-910

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

HELEN WEST,
Appellant,
vs.
ROADWAY EXPRESS, INC., *et al.*,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR SUMMIT COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS

(Dated April 21, 1982)

C.A. No. 10263

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

HELEN WEST,
Plaintiff-Appellee Cross-Appellant,

v.

ROADWAY EXPRESS, INC.,
Defendant-Appellant Cross-Appellee,

and

OTTO E. LIIPFERT and WILLIAM F. SPITZNAGEL,
Defendants.

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO CASE No. CV 78 01 0094

DECISION AND JOURNAL ENTRY

This cause was heard January 11, 1982, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties

and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

FACTS

Mrs. Helen West, plaintiff below and cross-appellant before this court, was an employee of Roadway Express, Inc. (hereafter Roadway) for many years. She began her employment in 1955 and, except for a brief interval, served that company continuously until 1976, when she was discharged.

In 1966, plaintiff began working as secretary to Otto E. Liipfert, who had been recently promoted to Vice-President of Field Operations. Liipfert repeatedly rated her performance as exceptional and outstanding. By 1974, plaintiff was the second highest paid secretary in the Akron executive offices.

In late 1974 or early 1975, Liipfert informed plaintiff that she was to report to William Spitznagel who was to be the new Executive Vice President of Field Operations at Roadway. Liipfert moved up to President of Roadway at the same time.

In November 1975, plaintiff was informed by Spitznagel to report directly to Mr. Charles Gielow, a subordinate of Spitznagel.

On June 24, 1976, plaintiff was discharged by Spitznagel. The reasons assigned for her dismissal were that her performance and her attitude were not in conformity with company standards.

Contending that her discharge was wrongful and motivated by her rejection of an alleged sexual proposition made to her by Liipfert during the summer of 1974, plain-

tiff sued Roadway, Spitznagel and Liipfert for damages in the Summit County Court of Common Pleas. We do not discuss here the aspects of plaintiff's complaint filed in U.S. District Court.

Plaintiff's complaint, filed January 12, 1978, claimed damages predicated upon two theories of recovery.

First, plaintiff contended that in order to induce her to resign voluntarily, she was subjected to sexual harassment of a malicious nature, which action on the part of defendants Liipfert and Spitznagel constituted not only an interference with her right to privacy; but an intentional and malicious infliction of emotional and physical distress upon her; an interference with her employment relationship with Roadway; an invasion of her civil rights and liberties; and a discriminatory practice in violation of R.C. 4112.02 and Section 2000e-2 et seq., Title 42, U.S. Code.

Secondly, she contended that the harassment resulted first in the reassignment of her employment duties, then demotion and finally, loss of her employment through termination. This claim, as opposed to the tort theories underlying her first contention, was based on the theory of contract. It was plaintiff's position that she was a party to an implied contract which assured her continuing employment with Roadway until she became 65 years of age.

The answer filed by defendants generally denied the allegations made by Mrs. West but, in addition, set forth a number of defenses which would bar plaintiff's claims for relief. These included the defense of the Statute of Frauds, The Statute of Limitations, Res judicata, waiver, and lack of jurisdiction.

The defendants' motion to dismiss the complaint was granted in part by the trial judge. The order of the court

dismissed plaintiff's discrimination practice cause of action under R.C. 4112.02 and Section 2000e-2 et seq., Title 42, U.S. Code, but overruled the motion with respect to the remaining claims.

Prior to trial, defendants also moved the court for summary judgment. The court's ruling on the motion found for defendants on plaintiff's claim for invasion of privacy and/or interference with plaintiff's private activities, and on her claim for malicious interference with her contract of employment. The court's order was subsequently followed by another, which, based upon the summary judgment ruling, dismissed plaintiff's claims against the individual defendants, as well as her claim for punitive damages. These orders are the foundations of plaintiff's cross-appeal.

The trial court's finding on the motion for summary judgment as it relates to the contractual issue is of pertinence to our consideration and thus, is inserted verbatim at this point:

> "* * *.
>
> "This Court is of the opinion that there is, after an employee has successfully completed a probationary period of employment, an implied promise that the employee will not be discharged except for cause."
>
> "* * *."

Plaintiff's remaining claim for wrongful discharge based on an implied contract was preserved for trial and resulted in a jury verdict in the amount of $287,000 rendered in favor of Mrs. West. This judgment is the subject of the Roadway appeal.

THE APPEAL OF ROADWAY EXPRESS

ASSIGNMENT OF ERROR I

"The trial court erred in submitting to the jury an issue of liability on a claim of an implied contract between the parties for assured employment until retirement and in not granting a dismissal upon motion of the appellant."

The established law in Ohio is that in the absence of an employment contract for a fixed and definite period, an employee may be terminated at the will of the employer for such cause as the employer believes valid. *Henkel v. Educational Research Council* (1976), 45 Ohio St. 2d 249. *Spain v. Luxaire, Inc.* (Lorain Co. Ct. App. No. 2800, Decided January 24, 1979) unreported.

Generally, even a contract for permanent employment or for life employment is construed to be nothing more than an indefinite hiring terminable at will, unless the express terms of the contract and/or other circumstances surrounding the agreement clearly manifest the parties' intent to bind each other for life. *Forrer v. Sears, Roebuck, and Co.* (1967), 36 Wis. 2d 388, 153 N.W. 2d 587 op. cit. *Henkel v. Educational Research Council, supra,* at 255. See also, Annot., 60 ALR 3d 226 (1974), and 35 Ohio Jurisprudence 2d 638, Master and Servant, Section 14.

Although plaintiff concedes that this is a correct and current statement of the law in Ohio, she nevertheless contends that Roadway's booklets, brochures, documents, manuals, retirement benefits, stock plans, statements of company policy, and company practice created an implied contract that employment with Roadway was permanent until retirement age 65, subject to termination only for good cause.

It is clear from the record that there was never an express contract, written or oral, between plaintiff and Roadway. We shall, therefore, examine the evidence that the trial court and the jury found to create an implied contract of employment.

When plaintiff rejoined Roadway in 1956, she, as well as other new employees, was given a booklet entitled "General Information for Office and Administrative Personnel" (plaintiff's exhibit no. 43). The booklet contained an introductory statement signed by R.W. Corns, then executive vice-president of the company, which provided, in part, that:

> "• • •
>
> "We intend to offer you full respect for your dignity as an individual, favorable conditions of employment, opportunity for advancement in accordance with your abilities and performance of duty, and a feeling of security and a sense of participation in our common business enterprise. We feel that your response should be one of good will toward our people, industry and effort toward your job, and loyalty to our Company."
>
> "• • •"

The booklet concluded with the following:

> "• • • We are very glad that you have chosen Roadway for your career. We extend to you our very best wishes and sincerely hope that your association with us will be a long and happy one."

A letter to Roadway's salaried employees from Galen J. Roush, then Chairman of the Board of Roadway, which accompanied a booklet explaining the company's new stock bonus plan, (plaintiff's exhibit no. 35) stated that:

"The Company's Stock Bonus Plan, * * * is designed to provide you with an opportunity to accumulate, during your working years, an ownership interest in Roadway stock to enhance the future financial position of yourself and your family.

"The Stock Bonus Plan is, in substance, a savings plan. It is a valuable supplement to the Company's existing Life Insurance, Medical, and Retirement Plans in that the stock accumulated will be available to you when you retire, as an element of your financial net worth; or, in the event of your death or disability, will help provide for your family."

"* * *."

The booklet itself provided that:

"* * *.

"Normally, you will receive your Roadway stock when you retire. * * *."

However, it is interesting to note that the booklet also stated that:

"The Roadway Stock Bonus Plan is for regular, full time salaried employees not covered by a labor contract. You are a regular, full time salaried employee *if your employment is for an indefinite period*, your regular work schedule is 40 hours or more per week, and your compensation is not related to the number of hours you work." (Emphasis added).

"* * *."

Roadway also established a voluntary stock purchase plan available to all Roadway employees. Additionally, Roadway provided a retirement plan, a medical care plan, a life and accident insurance plan, a long term disability plan, and a dental and vision care plan to its employees.

In addition, plaintiff produced documents and testimony which suggested that Roadway had established a practice of discharging employees only for good cause. Joseph May, who had held the position of director of employee relations at Roadway, testified that he had tried to discourage terminations without cause, and that:

> "* * * in this day and age we had to be cautious as to how we terminated employees; that we should establish the cause and document that in the personnel file before taking action."
>
> "* * *." (T.O.P. Vol. I, pg. 148).

Plaintiff also produced the Roadway Company Manual (plaintiff's exhibit no. 58) as evidence of an implied contract not to discharge except for just cause. In a section on terminations, the Manual provided that:

> "In the best of situations, there is always a certain amount of tension and strain connected with the terminating of an individual's employment. Due to these circumstances, all unnecessary discussion concerning the situation is to be avoided. While a person whose services are terminated is entitled to know the reason for such action, the comments must be factual and concise as possible. In other words, if a person's employment is terminated as the result of the individual's gross misconduct, the individual should be informed that his or her services are being terminated as a result of such action. If the termination is the result of the unsatisfactory performance of work or in the considered best interests of the company, the individual should be so informed without elaboration. Once a decision has been reached, after careful and thorough consideration, that an employee is to be released, there is nothing to be gained by

engaging in an argumentative discussion with the involved person."

The Manual also stated that:

"Employees whose services are to be terminated are to be given advance notice, except where the reason for discharge is dishonesty, gross neglect of duty, gross personal misconduct or any other reason justifying summary discharge under an applicable labor contract."

The Roadway Manual also established a 90 day probationary period of employment for all new employees during which time:

"• • •.

"If general progress and development are *not* considered satisfactory, immediate action shall be taken to terminate the employee's services. • • •."

Plaintiff submitted that the above evidence constituted an implied contract that after the successful completion of the probationary period, she was assured of permanent employment until her retirement and could only be terminated for just cause. We must respectfully disagree.

After an extensive examination of the testimony and exhibits produced by the plaintiff, we discover no basis for a finding that the various documents, booklets, benefits, and company practices are sufficient to create an implied contract for permanent employment, and/or an implied contract not to discharge except for just cause, in derogation of the established law of Ohio.

We must conclude that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway. See, *Henkel v. Council*,

supra; Fawcett v. G. C. Murphy & Co. (1976), 46 Ohio St. 2d 245; *Spain v. Luxaire, Inc., supra; Tullos v. Ponderosa Systems, Inc.* (Franklin Co. Ct. App. No. 78 AP-364, Decided December 5, 1978) unreported; *Schmidt v. Beams Broadcasting Corp., et al.* (Lucas Co. Ct. App. No. L-79-357, Decided July 3, 1980) unreported; and *Baric v. Firestone Tire & Rubber Co.* (N.D. Ohio No. C81-77A, Decided June 30, 1981) unreported.

Thus, Roadway's motion for summary judgment should have been granted, it being entitled to judgment as a matter of law. Accordingly, the verdict and judgment for plaintiff rendered below is reversed, and final judgment on the issue of implied contract entered in favor of Roadway.

ASSIGNMENTS OF ERROR

"II. Even if plaintiff's contract of employment was one for a fixed term, the statute of frauds, R.C. §1335.05, bars any claim thereon when there is no writing to embody any promise in respect of the essential terms of the agreement."

"III. Even if there were a basis to submit to the jury an issue as to the existence of an implied contract for a specific term, the trial court erred in permitting prejudicial testimony irrelevant to the issues in the case and in charging the jury on issues of fact not presented by the evidence."

Although our disposition of Roadway's initial assignment of error renders the remaining assignments of error moot, we are bound by the dictates of App. R. 12(A) to address in writing all errors assigned.

As we have stated above, plaintiff's employment was for an indefinite period, terminable at the will of either

party at any time. As such the Statute of Frauds is inapplicable.

Assuming, as apparently we must, that the claim of implied contract was properly tried and submitted to the jury we find that the testimony concerning defendant Liipfert's alleged proposition of plaintiff was relevant to the issue of the reason for plaintiff's discharge. The prejudicial effect of said testimony did not substantially outweigh its possible probative value such that it should have been excluded.

Finally, we find that the issues of whether there was an implied contract for assured employment until retirement, and whether plaintiff could only be terminated for just cause after the expiration of the probationary period of employment are in effect the same issue.

SUMMARY

Assignments of error two and three are overruled. Assignment of error number one is sustained and final judgment entered for defendant-appellant, Roadway Express, Inc.

THE CROSS-APPEAL OF PLAINTIFF HELEN WEST

ASSIGNMENTS OF ERROR

"1. The court erred in sustaining the defendants' motion to dismiss and in sustaining that part of their summary judgment motion relating to plaintiff's claim in tort for a malicious, abusive, wrongful, and wanton discharge, which had the effect of dismissing defendant Roadway Express, Inc. from any liability in tort, and in entering a judgment dismissing defendants Liipfert and Spitznagel as parties-defendant.

"2. The court erred in sustaining that part of the defendants' motion for summary judgment relating to plaintiff's claim for a wrongful interference with her private and personal life (invasion of privacy), and in entering a judgment dismissing defendant Liipfert as a party-defendant.

"3. The court erred in sustaining that part of defendants' summary judgment motion relating to plaintiff's claim for a wanton, willful, and malicious infliction of emotional and physical distress upon her (the tort of outrage), which had the effect of dismissing defendant Roadway Express, Inc. from any liability in tort, and in entering a judgment dismissing defendants Liipfert and Spitznagel as parties-defendant.

"4. The court erred in sustaining that part of defendants' motion for summary judgment relating to plaintiff's claim in tort for a wanton, willful, and malicious interference with her contract relationship with defendant Roadway Express, Inc. and in entering a judgment dismissing defendants Liipfert and Spitznagel as parties-defendant.

"5. The court erred generally in sustaining the defendants' motion to dismiss and in sustaining that part of the defendants' motion for summary judgment which related to plaintiff's claims in tort, because such ruling had the effect of denying her demand for punitive damages and excluding any evidence of the wealth of the defendants.

"6. The court erred in overruling plaintiff's April 9, 1979, motion requiring one Betty Rainieri, an employee of defendant Roadway Express, Inc., to answer questions propounded to her at an oral

deposition, for an order enjoining the defendants and their counsel, who also represented the witness, from instructing her not to answer questions, and from obstructing the plaintiff in her discovery.

"7. The court erred in overruling plaintiff's April 23, 1979, motion requiring one Douglas A. Wilson, an employee of defendant Roadway Express, Inc., to answer a question propounded to him at an oral deposition.

"8. The court erred in deferring any decision on the propriety and necessity of defendant Liipfert answering plaintiff's interrogatories nos. 1-10 and nos. 12-17, and defendant Spitznagel answering plaintiff's interrogatories nos. 1-8 and nos. 10-13, propounded to them on March 16, 1979."

I

Plaintiff's first assignment or error raises the issue of whether an employer has a completely unlimited right to terminate the employment of one whom it has hired for an indefinite term. The general rule, and that followed in Ohio, is that unless an employment contract specifically obligates both the employer and the employee for a definite term of employment, the employment is considered to be terminable at the will of either party. *Henkel v. Council, supra,* at 251. See also *Fawcett v. G. C. Murphy & Co., supra,* and *Spain v. Luxaire, Inc., supra.*

Although plaintiff does not challenge the general principle that an employee's employment may be terminated at the will of the employer without just cause, she asks us to recognize an exception to the rule. Plaintiff claims that notwithstanding the terminable-at-will doctrine, an employee has a cause of action sounding in tort when the

employee is fired for refusing to commit an illegal act or an act which violates a fundamental principle of public policy.

We recognize that in a growing number of jurisdictions, the terminable-at-will doctrine is not an absolute bar to a claim for wrongful discharge. Many of these jurisdictions have grafted a public policy exception to the terminable-at-will doctrine, such as that proposed by plaintiff.

The decisional law in this area is the opinion in *Petermann v. International Brotherhood of Teamsters* (1959), 174 Cal. App. 2d 184, 344 P. 2d 25, in which an at-will employee was discharged when he refused to commit perjury at the insistence of the employer. Although the case was decided on a cause of action sounding in contract, the court's holding that an employer's right to discharge an at-will employee may be circumscribed by considerations of public policy, provided the foundation upon which other courts have fashioned a cause of action for wrongful discharge based on tort.

Our research has revealed a growing number of jurisdictions which have recognized or have indicated a willingness to recognize the public policy exception to the terminable-at-will doctrine, and have characterized the cause of action as one in tort. See *Reuther v. Fowler & Williams, Inc.* (1978), 255 Pa. Sup. 28, 386 A. 2d 119; *Geary v. U.S. Steel* (1974), 456 Pa. 171, 319 A. 2d 174; *McNulty v. Borden, Inc.* (E.D. Pa., 1979), 474 F. Supp. 1111; *Sventko v. Kroger Co.* (1976), 69 Mich. App. 644, 245 N.W. 2d 151; *Trombelta v. Detroit, Toledo & Ironton R.R. Co.* (1978), 81 Mich. App. 489, 265 N.W. 2d 385; *O'Sullivan v. Mallon* (1978), 160 N.J. Super. 416, 390 A. 2d 149; *Pierce v. Ortho Pharmaceutical Corp.* (1980), 84 N.J. 58, 417 A. 2d 505; *Lally v. Copygraphics* (1980), 173 N.J. Super. 162, 413 A. 2d 960; *Nees*

v. Hocks (1975), 272 Or. 210, 536 P. 2d 512; *Brown v. Transcon Lines* (1978), 284 Or. 597, 588 P. 2d 1087; *Adler v. American Standard Corp.* (1981), 290 Md. 615, 432 A. 2d 464; *Ward v. Frito-Lay, Inc.* (1980), 95 Wis. 2d 372, 290 N.W. 2d 536; *Sheets v. Teddy's Frosted Foods* (1980), 179 Conn. 471, 427 A. 2d 385; *Roberts v. Atlantic Richfield Co.* (1977), 88 Wash. 2d 887, 568 P. 2d 764; *Johnson v. National Beef Packing Co.* (1976), 220 Kan. 52, 551 P. 2d 779; *Harless v. First National Bank* (W. Va., 1978), 246 S.E. 2d 270; *Jones v. Keogh* (1979), 137 Vt. 562, 409 A. 2d 581; *Brower v. Holmes Transportations, Inc.* (Vt., 1981), 435 A. 2d 952; *Tameny v. Atlantic Richfield Co.* (1980), 164 Cal. Rptr. 839, 610 P. 2d 1330; *Kelsay v. Motorola, Inc.* (1978), 74 Ill. 2d 172, 384 N.E. 2d 353; *Palmateer v. International Harvester, Inc.* (1981), 85 Ill. 2d 124, 421 N.E. 2d 876; *Perks v. Firestone Tire and Rubber Co.* (C.A. 3, 1979), 611 F. 2d 1363.

A few jurisdictions have held that a cause of action in tort for wrongful discharge is available, but only where the discharge is in direct violation of a statutory right or duty. See, e.g., *Frampton v. Central Indiana Gas Co.* (1973), 260 Ind. 249, 297 N.E. 2d 425; *Campbell v. Eli Lilly & Co.* (Ind., 1981), 421 N.E. 2d 1099; *Lampe v. Presbyterian Medical Center* (1978), 41 Colo. App. 465, 590 P. 2d 513; *Catania v. Eastern Air Lines* (Fla. App., 1981), 381 So. 2d 265.

Other courts have held that a discharge in contravention of public policy creates a cause of action for wrongful discharge, but that the cause of action sounds in contract. See *Monge v. Beebe Rubber Co.* (1974), 114 N.H. 130, 316 A. 2d 549; *Howard v. Dorr Woolen Co.* (1980), 120 N.H. 295, 414 A. 2d 1273; *Fortune v. National Cash Register Co.* (1977), 373 Mass. 96, 364 N.E. 2d 1251; *M.B.M. Co. v. Counce* (1980), 268 Ark. 373, 596 S.W. 2d 681; *Chin v.*

American Telephone & Telegraph (1978), 96 Misc. 2d 1070, 410 N.Y.S. 2d 737; and *Savodnik v. Korvettes, Inc.* (E.D. N.Y., 1980), 488 F. Supp. 822.

Still other jurisdictions have indicated a willingness to recognize a cause of action for wrongful discharge, based on the public policy exception to the at-will doctrine, but have failed to designate whether such cause of action is a contract or a tort claim. See, e.g., *Scroghan v. Kraftco Corp.* (Ky., 1977), 551 S.W. 2d 811; *Jackson v. Minidoka Irrigation Dist.* (1977), 98 Idaho 330, 563 P. 2d 54; *Abrisz v. Pulley Freight Lines* (Iowa, 1978), 270 N.W. 2d 454; *Keneally v. Orgain* (Mont., 1980), 606 P. 2d 127; *Mau v. Omaha National Bank* (1980), 207 Neb. 308, 299 N.W. 2d 147; *Daniel v. Magma Copper Co.* (1980), 127 Ariz. 320, 620 P. 2d 699.

In addition, recent scholarly commentaries have been in overwhelming support of recognition of a cause of action for wrongful discharge.[1] Nevertheless, a number of jurisdictions which have recently considered the issue have expressly rejected the public policy exception to the at-will rule, and have denied the discharged employee a cause of action. See, *Raley v. Darling Shop of Greenville, Inc.* (1950), 216 S.C. 536, 59 S.E. 2d 148; *Christy v. Petrus* (1956), 365 Mo. 1187, 295 S.W. 2d 122; *Freeman v. Elbilco,*

Footnote 1: See, e.g., Blades, Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404 (1967); Note, A Common Law Action for the Abusively Discharged Employee, 26 Hastings L.J. 1435 (1975); Comment, Protecting the Private Sector At Will Employee Who "Blows the Whistle"; A Cause of Action Based Upon Determinants of Public Policy, 1977 Wis. L. Rev. 777; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980); Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1 (1979); Comment, Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas, 34 Arkansas L. Rev. 729 (1981).

Inc. (La. App., 1976), 338 So. 2d 967; *West v. First National Bank* (1978), 145 Ga. App. 808, 245 S.E. 2d 46; *Griffith v. Electrolux Corp.* (E.D. Va., 1978), 454 F. Supp. 29; *Plaskitt v. Black Diamond Trailer Co.* (1968), 209 Va. 460, 164 S.E. 2d 645; *Bender Ship Repair v. Stephens* (Ala., 1980), 379 So. 2d 594; *Whittaker v. Care-More, Inc.* (Tenn. App., 1981), 621 S.W. 2d 395; *Dockery v. Lampart Table Co.* (1978), 36 N.C. App. 293, 244 S.E. 2d 272, *cert. denied* (1978), 295 N.C. 465, 246 S.E. 2d 215; *Kelly v. Mississippi Valley Gas Co.* (Miss., 1981), 397 So. 2d 874; *Ivy v. Army Times Pub. Co.* (D.C. App., 1981), 428 A. 2d 831; *Southwestern Bell Telephone Co. v. Dixon* (Tex. Civ. App., 1978), 575 S.W. 2d 596, *writ dism'd.* (Tex., 1980), 607 S.W. 2d 240; *Phillips v. Goodyear Tire and Rubber Co.* (C.A. 5, 1981), 651 F. 2d 1051.

So far as we are able to ascertain, Ohio has neither adopted nor specifically rejected an exception to the at-will rule. Thus, we are being asked to assimilate into the law of this state a cause of action in tort heretofore unrecognized here.

Each of the cases drawn to our attention has been read and considered in reference to its relationship to both existing Ohio law and to the law of the state from which the opinion has come. These opinions cover a wide variety of factual situations and present many divergent views concerning several theories of recovery. Although none of the theories advanced and given credence have exact parallels in this state, in light of the recent cases evidencing a growing trend toward judicial recognition of the public policy exception to the "terminable-at-will" doctrine, we hesitate to disagree that in the proper case, a cause of action for tortious wrongful discharge should be available to the discharged employee.

However, we do not reach the question of whether to recognize a cause of action for wrongful discharge, for even assuming, arguendo, that Ohio would follow the public policy exception, we do not find it applicable to the facts of the instant case. Several factors lead us to this conclusion.

Although it is argued that considerations of public policy demand that plaintiff be afforded some right of redress for her claimed injuries and resultant damages under one or more of the legal theories advanced, this court is of the opinion that there is no need to give birth to new remedies when there are adequate remedies in existence at the present time as provided by R.C. 4112.02 et seq. and Title VII (Section 2000 e-2 et seq., Title 42, U.S. Code).

While we do not hold that these statutory schemes provide the exclusive remedy for all actions involving job related sexual harassment, we are of the opinion that the protections and remedies afforded thereby preclude the necessity of our taking cognizance of additional causes of action heretofore unrecognized in the laws of this state. So long as the statutory protection exists, there is no reason on our part to implement what may be considered as the public policy of this state by creating new theories of tort liability.

Second, we find that plaintiff has failed to show that her termination by defendant Spitznagel in June 1976, was in any way related to the propositon allegedly made by by defendant Liipfert approximately two years earlier. Construing the pleadings of the parties, the depositions of the parties and the various witnesses, and other evidence in plaintiff's favor, and resolving all factual questions and inferences most strongly in her favor, we can

find absolutely no basis in the record upon which a reasonable jury could conclude that plaintiff's rejection of Liipfert's proposition was the motivational factor behind her discharge.

In any event, whether we need even reach this issue is extremely doubtful. In her complaint, plaintiff alleged that:

"* * *.

"8. Defendant's campaign of sexual harassment and abusive, malicious, wrongful and wanton discharge constituted the following:

"1. A wrongful interference with her private and personal life;

"2. A wanton, wilful, and malicious infliction of emotional and physical distress upon her;

"3. A discriminatory practice contrary to Section 4112.02, Ohio Rev. Code, and Title 42, U.S. Code, 2000 e-1, etc., particularly 2000 e-2(a), commonly referred to as the Equal Employment Opportunity Act of 1972;

"4. A wanton, wilful and malicious interference with her contract relationship with defendant, Roadway Express, Inc.; and

"5. An invasion of her civil rights and liberties."

"* * *."

Upon defendant's motion to dismiss the complaint for failing to state a cause of action and for lack of jurisdiction the court on March 29, 1978, ordered that:

"* * * the plaintiff's complaint regarding a violation of her rights under 42 U.S.C. Sections 2000 e-1,

et seq. and violations of her rights under Section 4112.02 et seq. of the Ohio Revised Code be, and the same hereby are, dismissed. With respect to the plaintiff's claim for invasion of privacy, malicious interference with contract and breach of contract, the defendants' motion to dismiss be, and the same hereby is, overruled and denied."

"* * *."

Over three years later, on May 27, 1981, upon defendants' pre-trial motion for summary judgment, the court ordered that:

"The defendants' motion for summary judgment is sustained with regard to plaintiff's claim for invasion of privacy and/or interference in or with plaintiff's private activities.

"The motion for summary judgment is sustained with regard to plantiff's claim of malicious interference with or in her contract of employment.

"The motion for summary judgment is denied with regard to plaintiff's claim for wrongful discharge."

"* * *."

We think it clear that the combined effect of these two orders of the court left for trial only plaintiff's claim for wrongful discharge based on breach of contract. That this view was obviously shared by both parties and the court is made evident by statements made by counsel in open court on June 9, 1981:

"* * *.

"MR. POWELL:

"At this time, in view of the Court's ruling that we are down to the one issue, that being the implied

contract, we feel that it is quite clear that punitive damages are not appropriate * * *.

"* * *.

"MR. WOLFE: I think basically, your Honor, in view of the Court's finding on the summary judgment, I would have to agree with counsel for the defendants, that the issue of punitive damages has been removed from the case on a breach of contract case.

"* * *.

"THE COURT: In that case, the defendants' motion to remove the issue of punitive damages is sustained."

"* * *."

For the same reasons, defendants Liipfert and Spitznagel were dismissed, and the case proceeded solely as a breach of implied contract action.

Clearly, the court's order of March 29, 1978, did not dismiss a claim for wrongful discharge based on tort, nor was defendant granted summary judgment on that claim by the May 27, 1981, order of the court. Thus, we can only surmise that if it were in issue at all in the proceedings below, the claim for tortious discharge was inadvertently or otherwise abandoned by plaintiff.

Accordingly, we overrule plaintiff's first assignment of error.

II

As first stated in *Housh v. Peth* (1956), 165 Ohio St. 35, 39:

"* * *.

" 'The invasion of the right of privacy may be defined also as the wrongful intrusion into one's private

activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities. * * *.'"

The issue is, therefore, whether the trial court erred in concluding that reasonable minds could not, after construing the evidence, pleadings, affidavits and various depositions most strongly in plaintiff's favor, find an intrusion into plaintiff's private life such as would cause outrage, mental suffering, shame and humiliation to a person of ordinary sensibilities.

Plaintiff claims that it is an actionable invasion of privacy for a male superior to invite his female secretary to come to his apartment after working hours. Although perhaps under some circumstances, such an invitation could be considered offensive, we do not find that the circumstances presented here are sufficient to constitute a cause of action for an invasion of privacy as defined in Housh v. Peth, supra.

Without deciding, a different result might have been reached had the proposition been continually repeated or pursued further. Such constant harassment might well cause mental suffering and humiliation sufficient to give rise to a cause of action for invasion of privacy. But that is simply not the case here. Plaintiff has alleged only a single incident, and there is no claim that it was ever repeated or even mentioned thereafter.

Accordingly, the second assignment of error is overruled.

III

Plaintiff claims that in order to induce her to resign, she was subjected to an unfairly heavy work load, numerous complaints, criticisms and insults, and was shunned

and ostracized, causing her severe emotional and mental distress.

The intentional infliction of emotional and mental distress, sometimes referred to as "the tort of outrage," is not recognized in this state as being the proper subject of a separate cause of action. *Hamilton v. East Ohio Gas* (1973), 47 Ohio App. 2d 55, 58.

We, therefore, reject plaintiff's third assignment of error.

IV

As we have previously stated in our discussion of the Roadway appeal, plaintiff had neither an express nor an implied contract of employment. Thus, plaintiff can have no cause of action for "interference with a contractual relationship." However, a cause of action is cognizable for interference with an employment relationship, even absent a contract.

Plaintiff claims that defendants Liipfert and Spitznagel maliciously interfered with her employment relationship with Roadway and are liable therefor. We disagree. As stated in *Anderson v. Minter* (1972), 32 Ohio St. 2d 207, 213:

"* * *.

"Tuttle is alleged to have maliciously induced Minter to suspend plaintiff, and upon that basis the Court of Appeals concluded that an 'action in tort' is stated against Tuttle 'for interference with [plaintiff's] employment.' We disagree.

"Tuttle is alleged to have been 'in a supervisory position over the plaintiff at the time of the acts complained of.'

> "Causes of action have been recognized against 'outsiders' for malicious interference with employment. Johnson v. Aetna Life Ins. Co. (1914), 158 Wis. 56, 147 N.W. 32. Where, however, the act complained of is within the scope of a defendant's duties, a cause of action in tort for monetary damages does not lie. Nor can liability be predicated simply upon the characterization of such conduct as malicious. * * *." (Citations omitted).

See also, *Fawcett v. G. C. Murphy & Co., supra;* and *Hill v. Gatz* (1979), 63 Ohio App. 2d 170, 175.

Without question, both Liipfert and Spitznagel were plaintiff's superiors. Certainly, the power to terminate plaintiff's employment was inherent in their respective positions. As stated above, even if plaintiff could prove a malicious motive in her termination, a cause of action for interference with her employment is nevertheless precluded.

Accordingly, we reject plaintiff's fourth assignment of error.

V, VI, VII, AND VIII

As we have already discussed in the preceding sections of this opinion, plaintiff's tort claims were properly dismissed by the trial court. Thus, we need not determine the propriety of the trial court's order overruling plaintiff's motion to compel answers from witnesses Rainieri and Wilson, for even if the court committed error in so ruling, such error was not prejudicial to plaintiff, and was, therefore, harmless.

Likewise, since Liipfert and Spitznagel were properly dismissed as parties-defendants, taking with them plaintiff's claim for punitive damages, the question of their

individual respective wealth was no longer an issue in the case. Again, the error in deferring the answers, if any, was harmless.

SUMMARY

Plaintiff's assignments of error are overruled and the judgment and orders of the trial court are affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to Helen West.

Exceptions.

/s/ WILLIAM H. VICTOR
Presiding Judge for the Court

VICTOR, *P. J.*
BELL, *J.*
Concurs

QUILLIN, *J.*
Concurs in
Judgment Only.

JOURNAL ENTRY OF THE COURT OF APPEALS

(Filed May 4, 1982)

C.A. NO. 10263

IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

HELEN WEST,
Plaintiff-Appellee Cross-Appellant,

v.

ROADWAY EXPRESS, INC.,
Defendant-Appellant Cross-Appellee.

JOURNAL ENTRY

Upon appellee's motion for reconsideration, the court finds that the last paragraph on page 11 of the Decision and Journal Entry filed in this cause on April 21, 1982, should read as follows:

"Thus Roadway's motion for directed verdict should have been granted, it being entitled to judgment as a matter of law. Accordingly, the verdict and judgment for plaintiff rendered below is reversed, and final judgment on the issue of implied contract entered in favor of Roadway."

To the extent above indicated, appellee's motion is well taken. The remainder of the motion is overruled.

/s/ WILLIAM H. VICTOR
Presiding Judge

/s/ SAM H. BELL
Judge

/s/ DANIEL B. QUILLIN
Judge

FINDING OF THE COURT OF COMMON PLEAS

(Filed March 17, 1978)

Case No. 78-1-0094

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

vs

ROADWAY EXPRESS, INC., et al.,
Defendants.

FINDING

This cause came on to be heard upon the Defendants' motion to dismiss the complaint.

It is the opinion of the Court that Plaintiff's complaint regarding a violation of her rights under 42 U.S.C. Sections 2000 E-1 et seq. must be dismissed by reasons of

the order of Judge Leroy J. Conti, Jr. in case No. C77-178A in the United States Dstrict Court of the Northern District of Ohio.

Plaintiff's complaint of a violation of her rights under Section 4112.02 et. seq. of the Ohio Revised Code must be dismissed for the failure of the Plaintiff to exhaust her administrative remedies as provided by the Ohio Revised Code, and further because the Revised Code does not provide for private enforcement of Section 4112.02 et. seq. except for violations of subsection H of Section 4112.02 of the Ohio Revised Code.

With regard to Plaintiff's complaints of invasion of privacy, malicious interference with contract and breach of contract, the Defendants' motion to dismiss is not well taken, and the same is herewith denied.

* * * * **

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*The portion omitted here pertains solely to a protective order in discovery and exceptions to the parties.

ORDER AND JUDGMENT OF THE COURT OF COMMON PLEAS

(Filed March 29, 1978)

Case No. 78-1-0094

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

ORDER AND JUDGMENT

This cause came on to be heard on the defendants' motion to dismiss the complaint for failing to state a cause of action and lack of jurisdiction and upon the defendants' motion for a protective order pursuant to Rule 26(C) against the taking of the deposition of Charles Zodrow.

Upon consideration of the briefs of counsel, the court on March 17, 1978, made a written finding of fact; it is therefore ORDERED that the plaintiff's complaint regarding a violation of her rights under 42 U. S. C. Sections 2000 e-1, et seq. and violations of her rights under Section 4112.02 et seq. of the Ohio Revised Code be, and the same hereby are, dismissed. With respect to the plantiff's claim for invasion of privacy, malicious interference with con-

tract and breach of contract, the defendants' motion to dismiss be, and the same hereby is, overruled and denied.

* * * * **

JUDGE PRICE

---

*The portion omitted here pertains solely to a protective order in discovery and exceptions to the parties.

FINDING OF THE COURT OF COMMON PLEAS

(Filed May 21, 1981)

Case No. 78-1-0094

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

FINDING

The Defendants motion for summary judgment is sustained with regard to Plaintiff's claim for invasion of privacy and or interference in or with Plaintiff's private activities. The motion for summary judgment is sustained with regard to Plaintiff's claim of malicious interference with or in her contract of employment.

This Court is of the opinion that there is, after an employee has successfully completed a probationary period of employment, an implied promise that the employee will not be discharged except for cause.

The motion for summary judgment is denied with regard to Plaintiff's claim for wrongful discharge.

JUDGE PRICE

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed May 29, 1981)

Case No. 78 1 0094

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

VS.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

The defendants' motion for summary judgment is sustained with regard to plaintiff's claim for invasion of privacy and/or interference in or with plaintiff's private activities.

The motion for summary judgment is sustained with regard to plaintiff's claim of malicious interference with or in her contract of employment.

The motion for summary judgment is denied with regard to plaintiff's claim for wrongful discharge.

It is so ORDERED, ADJUDGED and DECREED.

Exceptions to all parties.

JUDGE PRICE

JOURNAL ENTRY NUNC PRO TUNC, JUNE 9, 1981, OF THE COURT OF COMMON PLEAS

(Filed August 14, 1981)

Case No. CV 78 1 0094

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

JOURNAL ENTRY NUNC PRO TUNC

Counsel for defendants, having moved in limine in open court on June 9, 1981, that the court exclude all evidence of the wealth of the defendants giving rise to a claim for punitive damages against any of the defendants, and the court having sustained said motion for the reasons assigned and agreed to in the record;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that all evidence of the wealth of the parties defendant to this case be, and the same hereby is, excluded from consideration by the jury and the court, and that no claim for punitive damages be allowed.

Counsel for defendants, Otto E. Liipfert and W. F. Spitznagel, having also on June 9, 1981, moved in open court for a judgment of dismissal against said defendants

and the court having sustained the same, as will appear in the record;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Otto E. Liipfert and W. F. Spitznagel be, and they hereby are, dismissed as parties defendant in this case.

This judgment shall relate back and take effect as of June 9, 1981, nunc pro tunc.

JUDGE PRICE

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed June 16, 1981)

Case No. CV 78 1 0094

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HELEN WEST,
Plaintiff,

vs.

ROADWAY EXPRESS, INC., *et al.*,
Defendants.

JUDGMENT

The jury in this case having on June 12, 1981, rendered a verdict for the plaintiff and assessed her damages in the amount of Two Hundred Eighty-seven Thousand Dollars ($287,000.00);

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff Helen West recover from the defendant Roadway Express, Inc., the sum of Two Hundred Eighty-seven Thousand Dollars ($287,000.00), together with her costs herein expended.

Exceptions to the defendant Roadway Express, Inc.

JUDGE PRICE

PETITIONER'S PROPOSITIONS OF LAW ASSIGNED IN THE SUPREME COURT OF OHIO

Proposition of Law No. 1

The relationship of employer and employee arises out of contract, express or implied. As in the case of contracts generally, the duration of the contract, the time and method of termination, the compensation, and other provisions depend primarily upon the intention of the parties, interpreted in the light of all the surrounding facts and circumstances. (*Bascom v. Shillito* (1882), 37 Ohio St. 431 and *Kelly v. Carthage Wheel Co.* (1900), 62 Ohio St. 598 approved and followed.)

Proposition of Law No. 2

If an employer restricts its employees' freedom to terminate their employment so that their employment is not terminable at will, then the employer may not terminate its employees at will but only for just cause.

A. Because Roadway's employees were not free to terminate their employment at will, "mutuality of obligation" requires that Roadway should not be free to terminate its employees at will.

B. By structuring its employees' compensation to create a burden of diminished employee mobility, Roadway required its employees to furnish a consideration and Roadway received a benefit in addition to its employees' services.

Proposition of Law No. 3

An employment contract provision that an employee shall not be discharged except for cause may become part of the contract either by express agreement, oral or written, or as a result of the employee's reasonable expectations grounded in the employer's employment practices and personnel policies.

Proposition of Law No. 4

An employee has a cause of action in tort when the employee is discharged for refusing to commit an illegal act, an act which violates a fundamental principle of public policy, or the employee's civil or federal constitutional rights. When the employee's loss of employment is on the basis of sex and violates the employee's civil rights, the employee has a private cause of action for rights established by R.C. 4112.02 and 42 U.S.C. §§ 2000 *et seq.*

Proposition of Law No. 5

When a court holds that an employer's promise of permanent employment until retirement age is for an indefinite duration and, hence, terminable at will as a matter of law, even though a jury has found that the parties intended the employment to be terminable only for cause, the state has thereby impaired the obligation of contract, deprived the employee of her liberty and property and denied her trial by jury, contrary to Article I, §§1 and 5 of the Constitution of Ohio and Article I, §10 and the Fourteenth Amendment of the Constitution of the United States.

Supreme Court, U.S.
FILED
JAN 26 1983
Alexander L. St.

No. 82-966

Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 82-966

Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,

vs.

ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The present petition arises solely as a result of Petitioner's failure to prove the existence of an employment contract of definite duration in the state court below. She was accordingly unable to establish a right to damages on account of her termination. The issues were purely ones of evidentiary burden and contract construction under Ohio law. Having failed in that forum, Petitioner seeks to have this Court erect a federal constitutional doctrine of tenure in employment relationships. Such a doctrine has no basis in the Constitution and would conflict most strongly with the prior decisions of this Court.

Petitioner's Statement of the Case more or less accurately sets forth the factual background of her action and the key aspects of the evidence presented below, but mischaracterizes the holding of the Ohio Court of Appeals and the basis upon which Petitioner first raised constitutional issues before the Supreme Court of Ohio.

Petitioner's central contention, that the Court of Appeals held that she could have no contract of employment, is a glaring mischaracterization of the record. The Court of Appeals did not hold that "Plaintiff had neither an express nor an implied contract of employment" (Petitioner's Brief at 5 and App. A25), nor did it deny her right to enter into such a contract.

While the quoted phrase indeed appears in the Decision below, Petitioner cites it out of context, from a portion of the Decision which is not the subject of the present petition. Examination of the portion of the Decision dealing with the issue of the contract itself (Petitioner's Brief at App. A11) shows that the Court of Appeals held only that Petitioner's evidence was insufficient as a matter of state law to establish the existence of an employment contract of definite duration:

> After an extensive examination of the testimony and exhibits produced by the plaintiff, we discover no basis for a finding that the various documents, booklets, benefits, and company practices are sufficient to create an implied contract for permanent employment, and/or an implied contract not to discharge except for just cause, in derogation of the established law of Ohio. . .
>
> We must conclude that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway.

The cited language at Petitioner's App. A25 does not state the holding of the Court of Appeals and is of no constitutional significance. Petitioner's entire premise is thus without foundation in the record.

Examination of Petitioner's Memorandum in Support of Claimed Jurisdiction to the Supreme Court of Ohio shows that she did not assert any claim of deprivation of equal protection of the law or of her privileges and immunities as a citizen of the United States, but only of denial of due process. While she assigned broadly as error action "contrary to . . . the 14th Amendment of the Constitution of the United States," (Petitioner's Brief at 6 and App. A39), her Memorandum stated only that, "the Court of Appeals unconstitutionally impaired the obligation of Mrs. West's contract with Roadway, deprived her of liberty and property without due process of law, and trial by jury." (App. p. A15). Petitioner thus raises her equal protection and privileges and immunities claims for the first time in this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

I. THE DECISION BELOW IS IN FULL CONFORMITY WITH ALL REQUIREMENTS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS, HAS A FAIR AND SUBSTANTIAL BASIS UNDER OHIO LAW AND DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT.

Petitioner's due process argument is cast in terms of substantive due process only. Nevertheless, she seems to allude to procedural due process because she complains of the reversal of the jury verdict on appeal. Against the possibility that both aspects of the Due Process Clause are thus intended to be raised, both claims will be treated; both are groundless.

A. No Deprivation of Substantive Due Process Occurred Below.

The record below demonstrates no arbitrary or capricious deprivation of any of Petitioner's fundamental rights, as would be required to demonstrate a violation of substantive due process. *Youngberg v. Romeo*, 50 U.S.L.W. 4681 (1982); *Bell v. Wolfish*, 441 U.S. 520 (1979).

The Court of Appeals did not hold that Petitioner possessed no *right* to enter into a contract of definite duration, but expressly followed *Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976), the central holding of which is:

> 'Generally speaking, a contract for permanent employment, for life employment or for other terms pur-

> porting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages. . . .'

Id. at 255, 344 N.E.2d at 121-22. *Henkel* in turn did no more than follow the accepted American rule with respect to such employment relationships, as set forth in the Annotation at 60 A.L.R.3d 226, 232 (1974):

> Ordinarily, an employment agreement which mentions no period of duration, and is in a true sense made indefinite thereby, will be construed as being terminable at will by either party, and the burden of proving the contrary must be assumed by the party asserting that the employment was for a definite period. In fact, it has been said that such an agreement is not a contract at all, even though it may be certain insofar as wages to be paid and services to be performed are concerned; rather, such an agreement is an expression in which the promises as to the performance of services and the payment of compensation are illusory, since refusal to perform is not a breach, but an exercise of a reserved power to terminate.

Ohio law, as expressed in *Henkel, supra,* and in the present action, does not bar the formation of a contract of definite duration, but only sets evidentiary standards as to the requirements for proving the existence of such a contract, which Petitioner failed to meet. Petitioner nowhere contended below that the *Henkel* rule is itself contrary to the federal Constitution, but only that the Ohio Court of Appeals did not follow *Henkel.* Plaintiff,

moreover, has not demonstrated that a contract of indefinite duration ought to be accorded the stature of tenured employment, as a matter of federal constitutional law.[1]

This Court has frequently upheld the American rule reflected in *Henkel v. Educational Council, supra*, that an employment relationship, without more, is terminable at will by either party. *Bishop v. Wood*, 426 U.S. 341 (1976); *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972). Petitioner has cited no cases upholding a federal right of tenured employment. Indeed, the "common-law" tenure described in *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), cited by Petitioner, was expressly stated by the court to be an issue to be determined under Texas law:

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' *Board of Regents v. Roth, supra*, at 577, 33 L. Ed. 2d at 561. If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Id. at 602 n.7.

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1. As noted, Ohio has no such doctrine. The Ohio Common Pleas Court appeared incorrectly to have set out a theory of implied tenure in partially overruling Respondents' Motion for Summary Judgment below. See, Decision of the Court of Appeals, Petitioner's Brief at App. A6. The trial court's view was implicitly overruled by the Court of Appeals, following *Henkel, supra*. In any event, the trial court was presumably only expressing a view of Ohio, not federal, law.

B. The Reversal of the Verdict Below Pursuant to the Constitution and Rules of Court of Ohio Complied With All Requirements of Procedural Due Process.

The Court of Appeals exists by virtue of Article IV, Section 3 of the Constitution of Ohio, which provides in Division (B)(2) thereof,

> Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

Moreover, Rule 12(B) of the Ohio Rules of Appellate Procedure provides as follows:

> When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered.

It has been held by the Supreme Court of Ohio that it is the duty of a Court of Appeals to enter judgment for the appellant where the error assigned and sustained is the failure of the trial court to enter a directed verdict pursuant to motion. *Moncol v. Board of Education*, 55 Ohio St. 2d 72, 378 N.E.2d 155 (1978).

This Court has on several occasions determined that actions taken by a state or federal court pursuant to the laws and rules applicable to it, including the entering of judgment upon a directed verdict, do not constitute a deprivation of due process of law. *Galloway v. United States*, 319 U.S. 372 (1943); *Baltimore & Carolina Line v. Redmann*, 295 U.S. 654 (1935). Moreover, this Court will not review mere errors in the application of state law by a state court, such as Petitioner apparently contends occurred here. *Beck v. Washington*, 369 U.S. 541 (1962); *Howard v. Kentucky*, 200 U.S. 164 (1906). The reversal of the Ohio courts below on account of their alleged failure to apply Ohio law correctly would, in any event, be without significance beyond the limited controversy between these parties.

II. NO QUESTION OF FEDERAL LAW WAS DECIDED BELOW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Court Lacks Jurisdiction to Review Any Claim of Deprivation of Equal Protection of the Laws or of Privileges and Immunities of Citizens of the United States, Because Those Issues Were Not Raised Below.

As previously noted, Petitioner first raised her constitutional claims to the Supreme Court of Ohio, and did so only under the Due Process Clause of the 14th Amendment, and not under the Equal Protection or Privileges and Immunities Clauses. By reference in her Memorandum to the one clause and not to the others, the Supreme Court of Ohio could not have realized that an equal protection or privileges and immunities argument was being advanced, if in fact that was the case. Constitutional arguments of that nature cannot be raised for the first time before this Court. *Fuller v. Oregon*, 417 U.S. 40 (1974); *New York ex*

rel. Cohn v. Graves, 300 U.S. 308 (1937). There is thus a failure to meet the jurisdictional requirements of 28 U.S.C. §1257.

B. No Deprivation of Equal Protection Occurred Below.

Even assuming that Petitioner's equal protection argument is properly before this Court, the attributes of such a claim are simply not made out.

As an initial matter, Petitioner herein has failed to allege her categorization into a suspect classification which would necessitate strict scrutiny by the Court. *See, e.g., In Re Griffiths*, 413 U.S. 717 (1973) (alienage); *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Korematsu v. United States*, 323 U.S. 214 (1944) (ancestry). She seeks to vindicate the rights of "middle-level management employees" (Petitioner's Brief at 11), or, more broadly, of "nonunion employees" (Petitioner's Brief at 9).[2]

Petitioner has cited no cases demonstrating that such a class of employees forms a suspect category within the meaning of the Equal Protection Clause and indeed there is no basis for such a categorization. *See, e.g., Cleland v. National College of Business*, 435 U.S. 213 (1978) (holding that classifications based on one's status as a veteran are not suspect); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that classifications based

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2. Petitioner's contention that "Ohio has created a new classification of employees, i.e., 'non-contract' employees, thus denying some employees the same right to enter into employment contracts as is granted to other employees," (Petitioner's Brief at 11) is circular. Petitioner's asserted class has no defined attributes other than the absence of the very contracts claimed to have been deprived them by the state. The suspect attributes must be the cause, not the effect, of unconstitutional state action.

on age are not suspect); *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that classifications based on one's status as a conscientious objector are not suspect); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (holding that classifications based on wealth are not suspect).

Neither has Petitioner established that employment as such is a fundamental right, one which could only be limited to serve a compelling state interest. Where such rights have been recognized they have been expressly and narrowly defined. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote and participate in electoral process); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel in first appeal); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (freedom of association).

Other claimed rights have been rigorously excluded. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (government employment); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (education); *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy).

The proper analysis to be applied to Petitioner's contention, therefore, is whether the rule of Ohio law expressed in *Henkel v. Educational Council, supra*, is arbitrary or unreasonable insofar as it causes her not to have tenured employment as she would under a contract of definite duration.[3] As demonstrated above, Petitioner has not been accorded disparate treatment under the law of Ohio as to

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3. It should be emphasized again that Petitioner did not challenge the constitutionality of the *Henkel* rule below.

her right to contract for tenured employment, which has not been abridged.[4]

Petitioner appears to contend that employees of her status implicitly lack sufficient bargaining to obtain such contracts. However, the bare statement at page 9 of Petitioner's Brief that, "no employer, unless the employee has a remarkable talent or unique skill, will ever promise employment for a specific duration," lacks any foundation in the record below and is not susceptible to judicial notice. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937); 9 WIGMORE, EVIDENCE §2571 (Chadbourne rev. 1981).

This Court has never held that a state is obligated under the 14th Amendment to intervene in private relationships to ameliorate unequal bargaining power. *Ross v. Moffitt,* 417 U.S. 600 (1974); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The failure of the State of Ohio to imply tenure into employment relationships is neither arbitrary nor unreasonable.

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4. The doctrine of *Henkel v. Educational Council, supra,* as followed in the present case, imposes no bar upon the right of employees to contract for definite duration, thereby granting themselves a form of tenure. *Henkel* merely holds that tenure will not be inferred from the existence of an employment relationship alone, without more. The Petitioner herself has noted, citing *Bascom v. Shillito,* 37 Ohio St. 431 (1882), that the issue of the existence of a contract of employment of definite duration is one of fact. Presumably, the evidentiary burden as to such a contract would be no different than for proof of the existence of any other contract. A contract for a definite term in excess of one year in Ohio must be in writing to avoid the bar of the Statute of Frauds, Section 1335.05, Ohio Revised Code.

C. Petitioner Has Suffered No Abridgement of Her Privileges and Immunities as a Citizen of the United States.

Petitioner's claims under the Privileges and Immunities Clause, like her previous claims, depend upon her erroneous characterization of the decisions below as having deprived her of the "right to make and enforce an employment contract." (Petitioner's Brief at 13). Petitioner never claimed more than an *implied* contract in any event. She was and is free to bargain for express tenured employment, as has been noted above.

In this final aspect of her argument, however, Petitioner seems to recognize that employment tenure is a matter of state law under present constitutional interpretation, but seeks by calling for reversal of the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873), to make it newly a matter of federal right.

Broadening the Privileges and Immunities Clause has been consistently refused by this Court. *Bell v. Maryland,* 378 U.S. 226 (1964); *Madden v. Kentucky,* 309 U.S. 83 (1940). Petitioner has demonstrated no basis for a review of the settled interpretation of the Clause. Tenured employment is not a fundamental right under the Constitution and the rights of citizens to be free of arbitrary and unreasonable applications of state law are amply protected elsewhere. Further scrutiny of the *Slaughter-House Cases* is unnecessary, as is the creation of any federal doctrine of tenured employment.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. CHENOWETH, *Counsel of Record*
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APPENDIX

ARGUMENT FROM HELEN WEST'S MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION IN THE SUPREME COURT OF OHIO

ARGUMENT

Proposition of Law No. 1

The relationship of employer and employee arises out of contract, express or implied. As in the case of contracts generally, the duration of the contract, the time and method of termination, the compensation, and other provisions depend primarily upon the intention of the parties, interpreted in the light of all the surrounding facts and circumstances. (*Bascom v. Shillito* (1882), 37 Ohio St. 431 and *Kelly v. Carthage Wheel Co.* (1900), 62 Ohio St. 598 approved and followed.)

The Court of Appeals for Summit County misread *Henkel v. Educational Research Council* (1976), 45 Ohio St. 2d 249. The syllabus to *Henkel* holds:

> *In the absence of facts and circumstances* which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party. (Emphasis added).

Mrs. Henkel claimed she had a one year contract of employment solely by reason of a promise to pay her an annual salary of $10,800.00. Judge Paul W. Brown, writing

the Court's opinion deciding against Mrs. Henkel, referred to the surrounding facts and circumstance of her employment and followed two earlier Ohio Supreme Court cases: *Bascom v. Shillito* (1882), 37 Ohio St. 431 and *Kelly v. Carthage Wheel Co.* (1900), 62 Ohio St. 598. Judge Brown commented at 251-252:

> Bascom involved application to an oral contract of the principle that employment contracts which are silent as to the term of employment are to be interpreted in light of all relevant circumstances, including "proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question." . . .
>
> ". . . [t]he issue presented was purely one of fact; that it was for the jury to say whether that which took place between the parties, as detailed by the evidence, constituted a hiring for a year; that it was a question of intention, to be determined with reference to all the circumstances and facts of the case; . . ."

Further supporting the Court's opinion that the interpretation of the employment contract depends upon the intent of the parties, Judge Brown, at page 253, quoted *Kelly v. Carthage Wheel Co., supra*:

> "And, in the interpretation of contracts of this kind, as well as of all others, none of their provisions should be ignored or overlooked, that serve to indicate the intention of the parties."

Judge Brown further commented, at page 254, that, to reach the correct conclusion in *Kelly*, the Ohio Supreme Court

considered all relevant facts and circumstances, and carefully scrutinized the terms to the written offer. We view that approach as sound.

Because, except by inference, Roadway's contract of employment was silent as to the term of employment, we, as did Judge Price, also viewed the period, or term, and other terms of the contract to be issues of fact to be determined by a jury, as was done in *Bascom* and *Kelly*. If this Court in *Henkel* meant to imply that the terms of employment contracts are not questions of fact, to be interpreted in light of all relevant circumstances, then we respectfully urge the Court to accept jurisdiction of this case to either reverse, explain or qualify *Bascom v. Shillito,* and *Kelly v. Carthage Wheel Co.*, so that other common pleas courts will not expend needless time and effort in pointless litigation. On the other hand, if the Court of Appeals misread *Henkel,* as we believe it did, then we respectfully request this Court to assume jurisdiction to clarify its decision in *Henkel* and adopt our suggested proposition of law as a syllabus for this case.

Proposition of Law No. 2

If an employer restricts its employees' freedom to terminate their employment so that their employment is not terminable at will, then the employer may not terminate its employees at will but only for just cause.

This proposition was argued by Mrs. West in opposition to Roadway's motions for summary judgment and for a directed verdict, and was argued to the jury. It was also argued in Mrs. West's brief, as appellee, in the Court of Appeals, and discussed in oral argument. These critical facts and their obvious implications were totally ignored by the Court of Appeals.

A. *Because Roadway's employees were not free to terminate their employment at will, "mutuality of obligation" requires that Roadway should not be free to terminate its employees at will.*

The reason for the common law *presumption* that an employment contract for an indefinite term was terminable at the will of the master and servant was because it lacked "mutuality".

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; . . . and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of "mutuality". (*Pitcher v. United Oil & Gas Syndicate, Inc.* (1932) 174 La. 66, 69, 139 So. 760, 761).

Because Helen West and other Roadway employees would have sustained a substantial financial loss if they quit Roadway before retirement or entered into competition with it, they were not free to terminate their employment at will.

Roadway structured its compensation to financially penalize those employees voluntarily terminating their employment or competing with Roadway before or after retirement. Mrs. West and other nonunion, salaried employees at Roadway forfeited a portion of their stock and, before ERISA, their pension[2] if they quit before retire-

---

2. Roadway's contributions to its stock bonus and pension plans are deductible by Roadway from its federal income tax in the year in which expended and are not taxable to Roadway's employees until the stock or pension is received.

ment or if they competed with Roadway before or after retirement.[3] Had she quit on June 24, 1976, as Mr. Spitznagel requested, rather than being fired, and could have found employment with another trucking company, she would have forfeited seventy-five percent of the stock credited to her account. Her total stock compensation from 1966 through 1976 had a cost basis of $11,219.00; stock costing $8,435.00 would have been forfeited. (Plaintiff's exhibit 60). (By 1976, the market value of the stock had increased almost four hundred percent over its cost.) Roadway tied its employees to it for the duration because, as Mr. Spitznagel testified:

> [W]e have a very great interest in keeping productive employees, or having a productive work force at all times (T.O.P. 211).

Roadway's stock bonus plan brochure (plaintiff's exhibit 46, pg. 6) itself announced its purpose:

> A principal objective of the Plan is to encourage long term employment with the company.

Any stock forfeited by employees who quit or competed vested in those loyal employees who remained with the company, another inducement to stay with Roadway until retirement. The amount of financial loss which would have been sustained by Roadway's employees quitting to work for a competitor would have been staggering. Under these circumstances, Mrs. West's and other Roadway employees' apparent freedom to leave their employ is a fiction.

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3. Other highly competitive industries often utilize such forfeiture provisions. See *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal.App. 3d 35, 100 Cal. Rptr. 791, *affd* (1973), 414 U.S. 117.

B. *By structuring its employees' compensation to create a burden of diminished employee mobility, Roadway required its employees to furnish a consideration and Roadway received a benefit in addition to its employees' services.*

Furthermore, it has always been the law that where an employee furnishes a consideration in addition to his services, the requirement of "mutuality of obligation" is satisfied, and the contract is not terminable at will. 35 O.Jur. 2d, *Master and Servant* §14. Roadway's stock bonus plan and, before ERISA, its pension plan are simply contracts in partial restraint of trade, which are enforcible if supported by consideration and not unreasonable and oppressive. 17 O.Jur. 3d, *Contracts* §124; *Raimonde v. Van Vlereh* (1975), 42 Ohio St. 2d 21. In *Maloney v. E.I. Du Pont de Nemours & Co.* (1965), 352 F.2d 936, 236, *cert. denied* 383 U.S. 948, the court held, at 352 F.2d 939, that restrictions on the right to compete with an employer create a "substantial burden of diminished employment mobility". *Cf., Buschmeyer v. Advance Machine Co.* (1916), 7 Ohio App. 202. In consideration of their employment, salaried, nonunion employees like Mrs. West were restricted in their freedom to quit and compete.

The fact that Roadway's plans are voluntary does not render the employees' consideration illusory. The admitted benefit of the plans to Roadway was to encourage lifetime employment. The plans accomplished that end. Moreover, it was another fact evidencing Roadway's intent to provide permanent employment. The net effect of the Court of Appeals' decision is that Roadway, under that court's view of the common law of Ohio, is free to terminate its employees at will, but Roadway's employees, under the same common law, are not free to terminate at

will. The reason makes the rule and where the reason does not apply, then the rule should not apply.

Proposition of Law No. 3

An employment contract provision that an employee shall not be discharged except for cause may become part of the contract either by express agreement, oral or written, or as a result of the employee's reasonable expectations grounded in the employer's employment practices and personnel policies.

In one swath, the Court of Appeals, by finding she had no contract, cut off Helen West from all rights arising through her employment. But where an employer by its personnel practices and employment policies creates reasonable job expectations leading its employees to believe they have a job until retirement age providing they do their jobs well, thus encouraging loyalty and long service, the employer has created a situation instinct with an obligation justifying a dismissal only for good cause. As Judge Cardozo said in *Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N.Y. 88, 118 N.E. 214:

> A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. . . . If that is so, there is a contract.

Roadway established the following employment policies and practices from which a promise to dismiss only for cause could be inferred:

1. a probationary period of employment for all new employees;

2. dismissal of permanent employees only after notice and a third-party hearing;

3. postponed a portion of its employees compensation until retirement;

4. financially penalized those employees quitting before retirement or competing with it;

5. dismissed for good cause only after documenting reasons in the personnel file;

6. assured employees of job security and otherwise represented that an employee had a job with Roadway for his working life if he did his work well and was loyal and faithful to the company.

Our suggested proposition of law is not unique or radical. It is grounded on the employer's own conduct and employment practices. Several states have held that an employer through company policies and practices may create a "situation instinct with an obligation" not to dismiss its employees except for good cause, even though there may be no express promise of employment for a definite term. Some representative decisions are: *Fortune v. National Cash Register Co.* (Mass. 1977), 364 N.E. 2d 1251; *Toussaint v. Blue Cross & Blue Shield of Michigan* (1980), 408 Mich. 579, 292 N.W. 2d 892; *Pugh v. See's Candies, Inc.* (1st Dist. 1981), 116 Cal. App. 3d 311, 171 Cal. Rptr. 917. This Court planted the seeds of this proposition of law in 1882 when it held in the last sentence of the syllabus to *Bascom v. Shillito*, 37 Ohio St. 431: "Express words that the employment should continue for a year are not essential."

Proposition of Law No. 4

An employee has a cause of action in tort when the employee is discharged for refusing to commit an illegal act, an act which violates a fundamental principle of public policy, or the employee's civil or federal constitutional rights. When the employee's loss of employment is on the basis of sex and violates the employee's civil rights, the employee has a private cause of action for rights established by R.C. 4112.02 and 42 U.S.C. §§2000 *et seq.*

Mrs. West alleged and offered evidence in opposition to Roadway's summary judgment motion that defendants' campaign of "sexual harassment and abusive, malicious, wrongful and wanton discharge" was tortious and violated her civil rights, interfered with her contract relations, invaded her privacy, and intentionally inflicted emotional and mental distress.

A wrongful discharge suit exhibits the classic elements of a tort cause of action. As Professor Prosser has explained:

> Tort actions are created to protect the interests in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . .
>
> [Whereas] contract actions are created to protect the interests in having promises performed. (*Law of Torts* 613 [4th Ed. 1971]).

The Court of Appeals cited many cases from other states which have held that an employee may, under some circumstances, have a cause of action in tort for wrongful discharge. Other Ohio plaintiffs in other cases of wrongful dismissal, who believe they should not be discharged

for refusing to commit an unlawful or immoral act, will undoubtedly allege the tort theory of recovery.

A campaign of sexual harassment, initiated by a male superior towards his female subordinate after she refused to submit to a sexual proposal, culminating in the employee's discharge is a form of employment discrimination based on sex and violates rights granted by Section 4112.02 of the Ohio Revised Code and 42 U.S. Code §§2000 *et seq.* The courts should be "sensitive to the need to protect the individual employee from discriminatory exclusion from the opportunity of employment . . ." *Tameny v. Atlantic Richfield Company* (1980), 610 P.2d 1330, 1336, 164 Cal. Rptr. 839. Judge Price dismissed these claims because Mrs. West had not exhausted her state or federal administrative remedies; however, these statutes establish the public policy of the United States and Ohio with respect to employment discrimination and should give rise to a private cause of action.

With respect to plaintiff's claim for interference with her contract relations, this case affords the Court an opportunity to explain its decisions in *Anderson v. Minter* (1972), 32 Ohio St. 2d 207 and *Fawcett v. G. C. Murphy & Co.* (1976), 46 Ohio St. 2d 245. Mrs. West's dismissal was for refusing to perform a act not "within the scope of a defendant's [Liipfert's] duties." *Fawcett v. G. C. Murphy & Co., supra,* 250.

Proposition of Law No. 5

When a court holds that an employer's promise of permanent employment until retirement age is for an indefinite duration and, hence, terminable at will as a matter of law, even though a jury has found that the parties intended the employment to be terminable only for cause, the state has thereby impaired the obligation of contract, deprived the employee of her liberty and property and denied her trial by jury, contrary to Article I, §§1 and 5 of the Constitution of Ohio and Article I, §10 and the Fourteenth Amendment of the Constitution of the United States.

The right of an employee to contract for his labor, *the right to work*, is a fundamental and vital constitutional right incorporating the rights to individual liberty and to acquire property. As Justice Pitney declared in *Coppage v. Kansas* (1915), 236 U.S. 1, 14:

> Included in the right of personal liberty and the right of private property . . . is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

Justice Stewart in *Perry v. Sindermann* (1972), 408 U.S. 593, 601, noted

> that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range

> of interests that are secured by "existing rules or understandings".

This Court has held that "[t]he master and servant relation is one of contract, express or implied." Paragraph 4 of the syllabus to *Floyd v. The DuBois Soap Co.* (1942), 139 Ohio St. 520.

Ohio, under both the federal and Ohio Constitutions, may not deprive an employee of the right to contract employment, including as it must the rights of personal liberty and of private property, without due process of law. If the Ohio General Assembly had enacted a statute providing that contracts of permanent employment were terminable at will as a matter of law, even though the parties had agreed that they were terminable only for cause, would this court have any hesitancy in striking down such a statute as violative of freedom of contract and due process?

The state action depriving Mrs. West of her liberty and her property by impairing her contract was by the Ninth District Court of Appeals, rather than the General Assembly. State action within the prohibition of the Fourteenth Amendment can be judicial action as well as legislative or executive. *Shelley v. Kraemer* (1948), 334 U.S. 1. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U.S. 673, 680, Justice Brandeis stated:

> The federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative branch of government.

The Ninth District Court of Appeals unconstitutionally deprived Helen West of her personal liberty and her right of private property, and impaired the obligation of her contract, when it held that her employment relationship with

Roadway was for an indefinite duration, as a matter of law, and did not arise out of contract, express or implied.

Furthermore, by setting aside the verdict of the jury, which had found a promise of assured employment until retirement, terminable only for good cause, and entering final judgment for Roadway, the Court of Appeals denied Helen West her constitutional right to trial by jury.

In addition, procedural due process requires a hearing when interests encompassed by the Fourteenth Amendment's protection of liberty and property are deprived. *Board of Regents v. Roth* (1972), 408 U.S. 564, 570, note 7. By setting aside the jury's verdict, the Court of Appeals sanctioned Roadway's denial of procedural due process established by Roadway's own employment policies and practices.

WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST

Helen West and other middle-level managerial employees at Roadway were not offered express, written contracts of employment. Moreover, had they joined a labor union and entered into a collective bargaining agreement, they would have been excluded from participation in Roadway's stock bonus, incentive pay, pension, and other benefits designed for management employees. Their employment contracts were, therefore, necessarily implied from documents and company policies.

The Court of Appeals, misreading *Henkel v. Educational Research Council* (1976), 45 Ohio St. 2d 249, held that Roadway's implied in-fact promise of assured employment until retirement was for an indefinite duration and, consequently, Mrs. West's employment was terminable at

will. In fact, the court held, contrary to the established law of Ohio,[4] that she had no contract of employment at all. Still later, the court, in ruling on her claim of retaliatory discharge, held that in Ohio there is "no reason on our part to implement what may be considered as the public policy of this state by creating new theories of tort liability." (Decision and Journal Entry, p. 22).

Before the late eighteenth century, the law of master and servant was considered a branch of the law of domestic relations. Like that of parent and child, the relationship was not terminable at will and could not be changed by agreement. But by the time of Blackstone, writing in 1765, some masters and servants could contract with each other. I Cooley's Blackstone, *Commentaries on the Law of England* 268 (3d ed. rev., Callaghan and Company, 1884).

With the coming of the Industrial Revolution, to facilitate mobility and to liberate workmen from the rigid control of their masters, "[c]ontract became a device for entering *legally unsupervised relations*", Selznick, *Law, Society and Industrial Justice,* 123 (Russell Sage Foundation, 1969). The traditional presumption that a general hiring, i.e., one without a specific term, was for a year, was replaced by the converse presumption that "a general or indefinite hiring is *prima facie,* a hiring at will". Wood, *A Treatise on the Law of Master and Servant* §134, (1887). But this presumption was not intended to become a fixed and immutable rule of law, as was the case before Blackstone, so as to deprive the parties of their freedom of contract; it was simply a presumption, but not conclusive,

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4. R.C. 4141.01(B)(1) defines employment as "(a) Service performed for wages under any contract of hire, written or oral, express or implied. . . .".

which would control the relationship in the absence of a contrary intent. Wood, §134, n.5.

After reviewing the evidence, instead of holding that the jury's verdict finding a promise by Roadway of assured employment until retirement terminable only for cause was against the manifest weight of the evidence, which would have required a remand and new trial under *Hanna v. Wagner* (1974) 39 Ohio St. 2d 64 and Appellate Rule 12(D), the court entered final judgment for Roadway. In so doing, the Court of Appeals unconstitutionally impaired the obligation of Mrs. West's contract with Roadway, deprived her of her liberty and property without due process of law, and trial by jury.

Unquestionably, an employer may dismiss an employee for good cause. But the result of the Court of Appeals's holding is that in Ohio an employer who has impliedly promised an employee permanent employment until retirement, subject to termination for good cause, may still dismiss the employee "for such cause as the employer believes valid" (Decision and Journal Entry, p. 6). A management employee may be discharged for testifying truthfully in court, for being unduly friendly with a superior's rival, for refusing to contribute to the United Fund, for refusing to date a superior, for refusing to spy on another employee, for refusing to illegally fix prices, because he informed authorities about illegal corporate activities, to avoid paying a commission, to make room for a younger employee, or for any other imaginable reason whatsoever.

There is a compelling need in Ohio to provide some job security to middle-level, managerial employees who devote their lives to the company in the expectation of continuous employment, providing they do their jobs loyally and industriously. The contract aspects of the

Court of Appeals's decision affects every management level employee in Ohio who is not high enough in the corporate hierarchy to command a written contract of employment and not low enough to belong to a labor union. The tort aspect of the decision affects every employee who does not have an express, written contract of employment or who is not a member of a labor union, about seventy percent of the work force.[5]

For these reasons, plaintiff-appellant respectfully requests that this case be accepted for resolution on their merits of these timely and important issues.

Respectfully submitted,

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5. *Statistical Abstract of the United States*, Ohio: 1978, Table 715, p. 429, Department of Commerce, Bureau of Census (1980).

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No. 82-966

In the Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,
vs.
ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

While conceding that the issue of due process was timely and fully raised in the Supreme Court of Ohio, respondent maintains that petitioner did not raise the issues of equal protection or privileges and immunities in that court. Also, recognizing that due process is violated if the decision below is arbitrary and capricious, respondent challenges petitioner's contention that the Court of Appeals held that Mrs. West, despite more than twenty years of continuous employment at Roadway, "had neither an express nor an implied contract of employment." Finally, respondent argues that petitioner is attempting to create a "federal doctrine of tenured employment." Because these essentially new matters distort both the issues and the course of proceedings below, a reply is required.

ARGUMENT

A. THE ISSUES OF THE DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO THE EQUAL PROTECTION OF THE LAWS AND THE ABRIDGEMENT OF HER FUNDAMENTAL RIGHT, PRIVILEGE, OR IMMUNITY TO MAKE AND ENFORCE AN EMPLOYMENT CONTRACT WERE DRAWN IN ISSUE BEFORE THE SUPREME COURT OF OHIO.

Respondent argues that petitioner in the Supreme Court of Ohio did not draw in issue her claims of a denial of equal protection or an abridgement of her privileges and immunities by the Ohio Ninth District Court of Appeals. In support of its contention that the Court lacks jurisdiction of these claims, respondent has appended to its Brief a copy of Mrs. West's argument as appellant in the Supreme Court of Ohio.

Rule V of the Rules of Practice of the Supreme Court of Ohio provides that the appellant must attach an appendix to her Memorandum in Support of Claimed Jurisdiction setting forth "a copy of any statute or constitutional provision relied upon, to be construed or otherwise involved in the case." A statement of the Clerk of the Supreme Court of Ohio is filed with this Brief showing the United States constitutional provisions relied upon by Mrs. West in the Supreme Court of Ohio. As will be seen, petitioner expressly set out the Privileges or Immunities, the Due Process, and the Equal Protection Clauses in the appendix, to be considered by the Supreme Court of Ohio in determining whether a substantial constitutional question existed (Addendum, pp. A1-A2).

Not only were the Privileges or Immunities and the Equal Protection Clauses specifically drawn to the attention of the Supreme Court of Ohio, but references were made to the substance of these claims in petitioner's argument. Mrs. West argued that the Court of Appeals had expressly found she had no contract of employment, thus cutting her off "from all rights arising through her employment." (Appendix to Respondent's Brief A7). She asserted that "[t]he right of an employee to contract for his labor . . . is a fundamental and vital constitutional right. . . ." (Appendix to Respondent's Brief A11). To draw in issue the violation of a provision of the United States Constitution:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. *New York, ex rel., Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)

Petitioner claimed that the State of Ohio had impaired her employment contract (Appendix to Respondent's Brief A11 to A13, A15). Accordingly, the issue of the abridgement of the fundamental right to contract employment was drawn in question with "clear intendment" in the Supreme Court of Ohio. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954).

Claiming a denial of equal protection by the Court of Appeals, Mrs. West argued in the Supreme Court of Ohio that her employment arose out of contract, express or implied (Appendix to Respondent's Brief A1 to A3); that

she and "other middle-level managerial employees at Roadway" were excluded from the benefits of union membership (Appendix to Respondent's Brief A13); and that the Court of Appeals' decision affected every management-level employee in Ohio who was not "low enough to belong to a labor union" (Appendix to Respondent's Brief A15 to A16). These statements timely called to the attention of the Supreme Court of Ohio with fair precision petitioner's claim that the decision of the Court of Appeals denied her—and will deny other nonunion employees who are not corporate officers—the equal protection of the laws.

B. THE DECISION BELOW HELD THAT PETITIONER WAS NOT EMPLOYED UNDER EITHER AN EXPRESS OR AN IMPLIED CONTRACT OF EMPLOYMENT.

Although respondent argues the decision below held only that petitioner's evidence was insufficient to establish a contract of definite duration, a careful reading of the opinion of the Court of Appeals reveals that the court, misinterpreting Ohio law, expressly found that Mrs. West was not employed under either an express or an implied contract of employment. (If the decision of the Court of Appeals had been based on the weight of the evidence, the court would have been required under Ohio law to remand the case for a new trial. *Hanna v. Wagner*, 39 Ohio St. 2d 64, 313 N.E.2d 842 (1974)).

In holding that Mrs. West had no employment contract and, thus, could not bring an action for breach of contract, the Court of Appeals, even though she had been employed by respondent for over 20 years, held: "It is clear from the record that there never was an express contract,

written or oral, between plaintiff and Roadway."[1] (Appendix to Petition A8). After reviewing the documentary evidence, the Court of Appeals concluded "that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway. . . ." (Appendix to Petition A11). In explaining its decision, the Court of Appeals noted:

> The general rule, and that followed in Ohio, is that unless an employment contract specifically obligates *both the employer and the employee for a definite term of employment,* the employment is considered to be terminable at the will of either party. . . . (Appendix to Petition A15) (Emphasis added).

Finally, the court, in holding that Mrs. West could have no action against her superiors for interference with her contract relationship with Roadway, explained:

> As we have previously stated in our discussion of the Roadway appeal, *plaintiff had neither an express nor an implied contract of employment.* Thus, plaintiff can have no cause of action for "interference with a contractual relationship." However, a cause of action is cognizable for interference with an employment relationship, even absent a contract. (Appendix to Petition A25) (Emphasis added).

Conceding that Roadway, in fact, had promised Mrs. West that she would not be discharged except for just cause—as found by the jury—the Court of Appeals considered only whether Mrs. West had been offered *and*

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1. Obviously, Mrs. West was employed under an express contract of employment; otherwise, she would not have been entitled to enforce Roadway's obligations for salary, pension, or other employee benefits. Although the contract was express, some of its terms, for example, whether she could only be discharged for just cause, were implied from documents and company employment practices and policies.

she had promised to accept employment with Roadway for a definite time. The Court of Appeals concluded that in the absence of *reciprocal* promises to employ and to work for a fixed and definite period the agreement fails for definiteness and is "illusory", citing as authority (Appendix to Petition A7) Annot., 60 A.L.R.3d 226, 232 (1974), quoted by respondent in its Brief at page 5. Thus, Mrs. West, solely on the strength of a parenthetical statement from 60 A.L.R.3d having no basis in Ohio law, was relegated to the status of a "non-contract" employee who has no contractual rights against her employer. Until this decision, no Ohio case had held that an employer's promise to its employee that he or she would not be dismissed except for just cause is not an enforceable contractual obligation.

C. PETITIONER IS NOT ATTEMPTING TO ERECT A FEDERAL CONSTITUTIONAL DOCTRINE OF TENURE IN EMPLOYMENT RELATIONSHIPS.

Free labor must be based on contract. There is, or should be, a fundamental, federal constitutional right to contract employment. *Butchers' Union Slaughter-House and Live Stock Landing Co. v. Crescent City Live Stock Landing and Slaughter-House Co.*, 111 U.S. 746 (1884), concurring opinion of Bradley, J., 762; *Allgeyer v. Louisiana*, 165 U.S. 578, 589-590 (1897); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 536 (1922). Petitioner is not attempting to create a federal constitutional doctrine of tenured employment. Quite the contrary. An employer and employee should be free to contract the terms and conditions of employment free from judicial intervention. If an employer has not promised, either expressly and impliedly, that its employee will not be dismissed without

just cause, then the employee may be terminated at will. But if the employer promises its employee that she will be discharged only for just cause after successfully completing a probationary period, even though the term of employment is indefinite, then the employer's promise should be enforced.

The decision below held that Roadway's promise of assured employment until mandatory retirement, terminable only for just cause—as determined by a jury—could not be enforced because Mrs. West's employment was not based on contract, express or implied. It was the Ohio Ninth District Court of Appeals and the Supreme Court of Ohio which interfered with the contract relationship between Mrs. West and Roadway. Such intervention by Ohio through its judiciary deprived Mrs. West of her substantive due process right of freedom of contract, denied her the equal protection of the laws, and abridged her fundamental right as an American citizen to contract employment.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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A1

ADDENDUM

FRANK D. CELEBREZZE, CHIEF JUSTICE
WILLIAM B. BROWN
A. WILLIAM SWEENEY
RALPH S. LOCHER
ROBERT E. HOLMES
CLIFFORD F. BROWN
JAMES P. CELEBREZZE

The Supreme Court of Ohio

Columbus

James Wm. Kelly
CLERK

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February 4, 1983

John L. Wolfe
Attorney at Law
1900 First National Tower
Akron, Ohio 44308-1453

Re: West v. Roadway Express, Inc.,
Case No. 82-910

Dear Mr. Wolfe:

I wish to acknowledge your recent letter concerning the memorandum in support of jurisdiction filed by the plaintiff-appellant in the above captioned case in this Court.

I have examined that memorandum in support of jurisdiction and pursuant to the examination, state that the enclosed copy of certain provision of the Constitution of the United States was included as page 70 and was a part of the appendix to the memorandum.

I hope the above statement will be of assistance to you.

Very truly yours,

James Wm. Kelly

JWK:bw

Excerpt From Memorandum in Support of Claimed Jurisdiction Filed by Helen West in the Supreme Court of Ohio

[page 70]

CONSTITUTION OF THE UNITED STATES

ARTICLE I, §10

Section 10. No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.